United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7541

United States Court of Appeals

FOR THE SECOND CIRCUIT

DANIEL E. RYAN, Admr. of the Estate of Marvin George Ellsworth Mousseau,
Plaintiff,
vs.
NEW BEDFORD CORDAGE COMPANY, REYNOLDS & SON, INC., VERMONT CONSTRUCTION COMPANY, INC., and GEORGE & ASMUSSEN, LTD.,
Defendants,

VERMONT CONSTRUCTION COMPANY, INC.,
Plaintiff-Appellant,
vs.
JOHNSON INDUSTRIAL PAINTING CONTRACTORS, INC.,
Defendant.

Civil Action No. 73-240.

ALVIN E. MARTIN,
Plaintiff,
vs.
NEW BEDFORD CORDAGE COMPANY, REYNOLDS & SON, INC., VERMONT CONSTRUCTION COMPANY, INC., and GEORGE & ASMUSSEN, LTD.,
Defendants,

VERMONT CONSTRUCTION COMPANY, INC.,
Plaintiff-Appellant,
vs.
JOHNSON INDUSTRIAL PAINTING CONTRACTORS, INC.,
Defendant.

Civil Action No. 74-99.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT IN CIVIL ACTIONS No. 73-240 AND 74-99.

REPLY BRIEF OF DEFENDANT-APPELLANT TO JOHNSON INDUSTRIAL PAINTING CONTRACTORS, INC.

MILLER & NORTON,
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UNITED STATES COURT OF APPEALS
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In its Brief, Johnson does not deny that it breached its contract with Vermont Construction in the following ways:

1. No foreman of Johnson was present at the time the scaffold was erected and at the time of the accident as required by Article II of the contract between Johnson and Vermont Construction, Appendix 319.

2. By failing to perform the following duties contained in the general conditions:

   (a) Test and erect the scaffold in accordance with the Manual of Accident Prevention, Paragraph 20 of the General Conditions, Appendix 326.

   (b) To take precautions against injuries to persons, Paragraph 26 (a), Appendix 326.

   (c) To follow the safety provisions of applicable laws, building and construction codes, Paragraph 20, Appendix 326.

These breaches of contract were pleaded by Vermont Construction in its third-party complaint against Johnson, (Appendix 39 and 40) and were proven at trial.

The appellees have cited no cases which hold or suggest that Johnson should not be liable for the breach of its contract.

The central theme in both the trial court's ruling dismissing the third-party complaint and in Johnson's Brief is that Vermont Construction is a tortfeasor with independent duties to supervise and therefore cannot obtain contribution

from Johnson as such is prohibited by the rule against contribution between joint tortfeasors.

The flaw in the trial court's ruling and in Johnson's brief is the failure to take into account the contractual obligations voluntarily assumed and assented to by Johnson in its written agreement with Vermont Construction.

Neither the trial court nor Johnson deal with the written contract and the consentual obligation owing to Vermont Construction. They both choose to ignore it entirely hoping somehow that the broad maxim against contribution among joint tortfeasors will justify their refusal to deal with the contract.

These same arguments were raised and rejected soundly in Ryan Stevedoring Co. Inc. vs. Pan-Atlantic SS. Corp., 350 US 124, 100 L ed 133, 76 S Ct 232 (1956), by the United States Supreme Court. In that case an employee of the stevedoring contractor sought to recover damages from a shipowner for an injury which resulted from the improper stowage of cargo aboard the ship. The shipowner filed a third-party complaint against the stevedoring contractor. The District Court allowed recovery against the shipowner but dismissed the third-party complaint. The Second Circuit Court of Appeals affirmed the judgment in favor of the injured employee, but reversed the dismissal of the third-party complaint. On appeal to the United States Supreme Court, the decision of the Court of Appeals was affirmed.

In considering the question of whether in the absence of an express agreement of indemnity, the contractor was obliged to reimburse the shipowner for damages caused by the contractor's improper stowage of cargo, the court passed on the very same argument implicit in the trial court's ruling in the instant case and found in Johnson's Brief.

The stevedoring contractor argued that the shipowner was a joint tortfeasor, not entitled to contribution. And, that the shipowner had an obligation to supervise the stowage and a right to reject unsafe stowage of the cargo and did not do so which were independent and separate obligations of the shipowner apart from any obligations on the part of the stevedoring contractor. The United States Supreme Court rejected both arguments. The court said:

> ..."the shipowner's action for indemnity here is not based merely on the ground that the shipowner and the contractor each is responsible in some related degree for a tortious stowage of cargo that caused injury to Palazzolo. Such an action brought without reliance upon contractual undertakings, would present the bald question whether the stevedoring contractor or the shipowner, because of their respective responsibilities for the unsafe stowage, should bear the ultimate burden of the injured longshoreman's judgment. That question has been widely discussed elsewhere in terms of the relative responsibility of the parties for the tort, and those discussions have dealt with concepts of primary and secondary or active and passive tortious conduct. Because respondent in the instant case relies entirely upon petitioner's contractual obligation, we do not meet the question of a non-contractual right of indemnity..."

"The shipowner's claim here also is not a claim for contribution from a joint tortfeasor. Consequently the consideration which led to the decision in Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp. 342 US 282, 96 L ed 318, 72 S ct 277, are not applicable. See American Mut. Liability Ins. Co. v. Matthews (CA2d NY) 182 F2d 322.

The shipowner here holds the petitioner's uncontroverted agreement to perform all of the shipowner's stevedoring operations at the time and place where the cargo in question was loaded. That agreement necessarily includes the petitioner's obligation not only to stow the pulp rolls, but to stow them properly and safely. Competency and safety of stowage are inescapable elements of the service undertaken. This obligation is not a quasi-contractual obligation implied in law or arising out of a noncontractural relationship. It is of the essence of the petitioner's stevedoring contract. It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product. The shipowner's action is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of petitioner's stevedoring service.

The Court of Appeals has stated that the liability of petitioner in this case is for the performance of its obligation to stow the rolls on board ship "in a reasonably safe manner." 211 F2d, at 279. That court also has affirmed the decision of the District Court which was based upon the verdict of the jury that petitioner's improper stowage of the rolls produced either the unseaworthiness of the ship, or the hazardous working condition which is the basis for the shipowner's liability to Palazzolo.

Petitioner suggests that, because the shipowner had an obligation to supervise the stowage and had a right to reject unsafe stowage of the cargo and did not do so, it now should be barred from recovery from the stevedoring contractor of any damage caused by that contractor's

> uncorrected failure to stow the rolls "in a reasonably safe manner." Accepting the facts and obligations as above stated, the shipowner's present claim against the contractor should not thereby be defeated. Whatever may have been the respective obligations of the stevedoring contractor and of the shipowner to the injured longshoreman for proper stowage of cargo, it is clear that, as between themselves, the contractor, as the warrantor of its own services, cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense. Respondent's failure to discover and correct petitioner's own breach of contract cannot here excuse that breach." (350 US 132-134)

The reasoning and holding in the Ryan case should lay to rest once and for all any doubt that Vermont Construction has a right to maintain a claim against Johnson on the contract obligation that existed between the two irrespective of whether or not it can be said that Vermont was guilty of negligence with regard to the injured plaintiffs. The claim of Vermont Construction against Johnson is founded upon obligation of a contract which in no wise can be diminished by any claim of tortious conduct on the part of Vermont Construction. When Johnson undertook to perform the masonry contract and supply all of the necessary equipment, it undertook, as stated in the Ryan opinion, "a warranty of workmanlike service that is comparable to the manufacturer's warranty of the soundness of its manufactured product." And, in the words of Ryan, Johnson, "as warrantor of its own services, cannot use [Vermont Construction's] failure to discover and correct the contractor's own breach of warranty as a defense."

The reasoning and logic of the Ryan case mandate that the trial court's dismissal of the third-party complaint must be reversed.

Respectfully submitted,

MILLER & NORTON

By _____
Lawrence Miller

AFFIDAVIT OF SERVICE BY MAIL

Re: Daniel E. Ryan et al vs. New Bedford Cordage Co. et al

76-7541

State of New York)
County of Genesee) ss.:
City of Batavia)

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 12th day of April 19 77 I mailed ~~Reply Bf's.~~ copies of a printed in the above case, in a sealed, postpaid wrapper, to:

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at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

Miller & Norton Esqs., 205 South Main St.

Rutland, Vermont 05701 Att: Lawrence Miller Esq.

Leslie R. Johnson

Sworn to before me this

12th day of April, 19 77

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1977